



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20541

B-178593

October 10, 1973

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Law Offices of Fred Israel
1015 18th Street, NW.
Washington, D. C. 20036

Attention: Charles E. Raley, Esquire

Gentlemen:

Reference is made to your letter of August 3, 1973, and prior correspondence, on behalf of Essex Electro Engineers, Incorporated, protesting the award of a contract on the basis of a corrected bid to UMC Electronics Company under invitation for bids (IFB) No. DAAFO3-73-B-1273, issued by the Commanding General, United States Army Weapons Command, Rock Island, Illinois. As explained below, we see no basis for disturbing the award.

The subject IFB solicited bids for the manufacture and delivery of 112 test stands for various equipment and for new equipment training. The unit prices were to be submitted in the alternative on the basis of FOB origin and destination, with and without first article approval (FAA). Bids were opened on January 18, 1973, revealing bid submissions from three firms at the following unit prices:

	<u>Dest.</u> W/FAA	<u>Origin</u> W/FAA	<u>Dest.</u> WO/FAA	<u>Origin</u> WO/FAA
UMC Electronics	\$ 6,108.00	5,948.00	6,007.00	5,847.00
Essex Electro	7,382.00	7,292.00	-----	-----
Sun Electric	10,671.70	10,563.70	10,437.35	10,329.35

It is reported that since UMC's prices were significantly lower than both the other bids received and previous prices from UMC for the same item, UMC was requested by the contracting officer's letter of January 23, 1973, to verify its bid and, in the event, a mistake is claimed, to submit documentation to support the alleged mistake.

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By letter of February 6, 1973, UAC's president advised the contracting officer that all unit prices should have been \$1,000 higher due to an error in addition of the final tally of the \$5,948 figure (from which the other unit prices were derived). The letter enclosed the original work sheets in pencil purporting to show that an error was made in the addition of the following figures:

Total Unit Direct Cost	5020
Direct Cost Contingency	178
Recovery for Overhead and Profit	<u>1750</u>
	5948

The letter related that company policy on larger Government procurements dictated confidentiality in the computation of prices before bid opening, so that the final price was computed by the president. Due to the fact that the typist (the only other person cognizant of the final price) did not have access to the work sheets, the error committed by the president was not discovered prior to bid opening.

The work sheets submitted with the referenced letter included two standard form printed proposal cost sheets on a per unit basis with handwritten entries for the estimated costs. The first of these was dated January 11, 1973, and the second was dated January 15, 1973. The January 11 sheet quoted a unit price of \$8,000.87, while the January 15 sheet quoted a unit price of \$6,101.00. These figures included factory burden, engineering burden, G & A at 16 percent, and profit in the case of the January 11 sheet, while all but profit was set forth in the January 15 sheet. A further summary sheet was included which apparently was prepared by the president alone.

This latter sheet contained two columns of figures - one for the estimate of January 11, and another for the estimate of January 15. This sheet omitted the figures for burden, G & A and profit, and set forth a "Total Direct Unit Cost" of \$5,510 for the January 11 estimate and \$5,020 for the January 15 estimate. To the January 15 estimate was added the figure of \$178 for "Direct Cost Contingency" and \$1,750 for "Recovery for Overhead and Profit," with the arithmetically erroneous total of \$5,948 per unit.

The bidder also submitted, as evidence intended to corroborate this method of costing, a work sheet for a procurement of portable hydraulic test stands, involving a January 23, 1973, bid opening, in which a unit price of \$7,686 was derived by eliminating from a total price of

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\$8,729,42 the factory burden, G & A, and profit for a direct unit cost of \$5,936, to which the identical figure of \$1,750 was added to cover other costs, including profit.

The bidder also explained that although the bid document in the instant case was typed and dated on January 12, 1973, the bid prices were not entered until the final price review on January 15, 1973, at which time the bid was mailed.

A subsequent undated letter to UMC's president from the contracting officer requested an explanation for the reduction or omission in the work sheet of January 15 of various cost elements set out in the work sheet of January 11. It further requested an explanation for the omission by the president in his final compilation sheet of January 15 of factory and engineering burden, G & A, and profit, and the substitution therefor of the figure of \$1,750.

By affidavit of March 7, 1973, UMC's president stated that UMC's pricing of all major procurements involves a procedure whereby a formal cost sheet is submitted to him by the Engineering Department; that a meeting is then conducted with all necessary personnel of each department to ascertain if any further cost reductions can be realized; that if further cost reductions may in fact be realized, a supplemental cost sheet is then compiled and submitted by the Engineering Department; and that he then utilizes a direct cost method whereby direct out-of-pocket costs plus a small contingency factor are ascertained, and an amount is then added which he considers necessary for recovery of overhead and profit. As explained by UMC's president, normal burden rate structures are not utilized in this method of bidding, since he alone determines the final price of the bid. By letter of March 12, 1973, UMC's vice president-engineering corroborated the procedure outlined in the president's referenced affidavit.

Armed Services Procurement Regulation (ASPR) 2-406.3(a) authorizes military departments to make certain determinations with regard to mistakes in bids alleged after bid opening but prior to award. The regulation provides, insofar as is pertinent here, that a bidder may be permitted to correct a mistake in bid if there is clear and convincing evidence of both the mistake and the bid actually intended. Subparagraphs (c) and (d) of the regulation provide that such determinations shall be concurred in by legal counsel and that to support correction the

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record submitted by the contracting officer shall contain the "best available evidence conclusively establishing not only the existence of the error, but its nature, how it occurred, and what the bidder actually intended to bid."

On the basis of the evidence enumerated in the foregoing discussion, the contracting officer recommended that correction be permitted, and the General Counsel, AMC, determined on April 13, 1973, that there existed clear and convincing evidence of a mistake in the amount of \$1,000, and accordingly permitted correction of UMC's bid from \$5,948 to \$6,948. On April 30, 1973, the contract was awarded to UMC.

Thereafter you protested to our Office. You also filed a motion for a preliminary injunction in the United States District Court for the District of Columbia (Civil Action No. 1176-73) challenging the legality of the bid correction. By Order dated June 26, 1973, the Court denied the motion.

By letter dated July 5, 1973, you advised us that Essex had filed an action for declaratory and injunctive relief in support of the protest in the United States District Court for the District of Columbia. Subsequently, by letter of August 3, 1973, you forwarded a copy of an Order by the Court dated August 1, 1973, dismissing the subject action without prejudice. We received this information on August 8, 1973, along with your request that we render a decision on the protest.

You have expressed doubt as to the authenticity and credibility of the work sheets, alleging that they do not in fact constitute clear and convincing evidence of the mistake and bid actually intended. You state it is incredulous that such a mistake could have been made from a simple arithmetical computation involving only three numbers in view of the importance of the procurement, and stress that the simple process of inserting the figure 1 before the figures 750 in the sum delineated as "Recovery for overhead and profit" would account for the alleged error and that such insertion could have been effected at any time. You also point to the numerous unexplained deductions and modifications on the work sheets from the computations performed on January 11 to the final price computed on January 15, 1973, as casting doubt on their authenticity.

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You take issue with the probative value of the work sheets allegedly utilized by UMC in computing its bid price for the procurement involving portable hydraulic test stands under IFB DAAJ01-73-B-0092 which also indicates that the figure of \$1,750 was used to cover overhead and profit. In this connection, you argue that there is no indication that the items are similar, but if they are then it appears that the \$8,000 price on the first work sheet was the intended price under the subject IFB as the bid under IFB -0092 was \$7,686.

You emphasize that the cover letter to UMC's bid, the acknowledgment of the three amendments to the IFB, and the IFB itself are all dated January 12, whereas the worksheet figures depicting the error are dated January 15. In these circumstances, you contend that the standard of proof necessary for correction has not been met.

In evaluating the possibility that UMC may have restructured its work sheet to indicate an intended figure of \$1,750 for recovery of overhead and profit when in fact a figure of \$750 was utilized, we believe that several factors are significant. First, UMC's bid prices were so low in relation to the other bids received and UMC's prior prices for the same item that a mistake is indicated. The work sheets and affidavits lend credence to UMC's explanation of its pricing refinement process and arithmetic miscalculation of the final price. Also, the work sheets on which UMC's bid of \$7,686 under IFB DAAJ01-73-B-0092, was based, which the record indicates was mailed on January 5, 1973, manifests the identical figure of \$1,750 for overhead and profit. Inasmuch as UMC's president has stated that the figures for overhead and profit are not predicated upon normal burden rate structures (i.e., percentages), but rather upon what he considers necessary for recovery of overhead and profit, and that the items solicited under that IFB appear to be somewhat similar, we consider this of evidentiary value also in negating the likelihood that UMC's original figure was \$750 rather than \$1,750.

With regard to the disparity in dates between the typewritten date of January 12, 1973, appearing on UMC's cover letter, amendment acknowledgments and bid, and the date of the final computation of price by its president, January 15, 1973, the UMC president explained in his letter of February 6, 1973, that his bid set was typed and dated on January 12, 1973, but was not mailed until January 15, 1973, on which date the prices were entered. We find this explanation consistent with both the date on the work sheet of the final price computation and UMC's stated method of preparing the final bid price through a process of price

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refinement from an initial set of figures. Further, the date of mailing is evidenced by postal receipts. Accordingly, and in the absence of any evidence in the record establishing that UMC's bid was mailed prior to January 15, 1973, we are unable to consider the disparity in dates to be of any significance. Furthermore, we are unable to conclude that the differences between the work sheets are of particular significance insofar as their authenticity is concerned.

Finally, you call attention to our decision 48 Comp. Gen. 748 (1969) where we expressed the view that bid correction should be denied in any case, regardless of the good faith of the bidder involved where the integrity of the competitive bidding system would be compromised by allowing bid correction. In that decision we also recognized, however, that there are cases in which bid correction should be permitted. As stated in B-174608, May 9, 1972, "bid correction, we believe, is an appropriate and necessary avenue of relief whereby the Government might retain the benefits of a low price."

In this case, we do not find that the administrative determination to permit correction of the UMC bid was arbitrary or otherwise improper. Accordingly, your protest is denied.

Sincerely yours,

H. F. Keller

Deputy] Comptroller General
of the United States